# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>April 14, 2005 |
| v | No. 253622<br>Oakland Circuit Court |
| DAYO A. AJAYI,<br><br>Defendant-Appellant. | LC No. 03-192301-FH |

Before: Whitbeck, CJ, and Zahra and Owens, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions of felon in possession of a firearm, MCL 750.224f, possession of a firearm during the commission of a felony, MCL 750.227b, and carrying a concealed weapon, MCL 750.227. He was sentenced as an habitual offender, fourth offense, to concurrent terms of three to fifteen years' imprisonment for the felon in possession and carrying a concealed weapon convictions, to be served consecutively with and after the mandatory two-year sentence for the felony firearm conviction. Because defendant violated parole, he received no credit for time served, and the court ordered that his sentence for parole violation be served before the instant sentence commenced. This case arose when police responded to a call and found a gun in the car in which defendant was a passenger. We affirm.

Defendant first argues that he was illegally seized when he was placed in one of the officers' cars. We disagree.

A trial court's ruling on a motion to suppress is subject to de novo review with respect to any mixed question of fact and law and any pure question of law but is reviewed for clear error with respect to findings of fact. *People v Powell*, 235 Mich App 557, 560; 599 NW2d 499 (1999). A person is seized "if, in view of all the circumstances surrounding an encounter with police, a reasonable person would have believed that the person was not free to leave." *People v Shankle*, 227 Mich App 690, 693; 577 NW2d 471 (1998). Officer Buckberry testified that defendant was patted down and placed in the back of Officer Ceurijian's patrol car, and defendant was unable to leave the car. Therefore, it was reasonable to believe that defendant was not free to leave and, thus, was seized within the meaning of the Fourth Amendment. *Shankle, supra* at 693. Defendant argues that this was unlawful because the officers did not have probable cause to believe that he had committed an offense.

Although probable cause is required before an officer can make a formal arrest or a seizure resembling a formal arrest, *Michigan v Summers*, 452 US 692, 696; 101 S Ct 2587; 69 L Ed 2d 340 (1981),[1] an investigatory stop only requires "specific and articulable facts sufficient to give rise to a reasonable suspicion that the person detained has committed or is committing a crime." *Shankle, supra* at 693. When warranted by the circumstances, an officer may take reasonably necessary steps to maintain control of the situation and protect his safety. *United States v Hensley*, 469 US 221, 235; 105 S Ct 675; 83 L Ed 2d 604 (1985). Placing suspects in the back of a patrol car may be reasonable during an investigatory stop in some situations. *People v Marland*, 135 Mich App 297, 302-306; 355 NW2d 378 (1984) (a single officer investigating suspicious activity of two subjects was justified in placing them in the back of his patrol car when one of the subjects attempted to flee, and the other acted nervous and denied knowing the first subject).

Here, testimony indicated that the police were aware the complainant's car had previously been broken into, and police were responding to a call that two subjects were attempting to contact the complainant at his apartment. When the two officers first arrived, defendant and Green were talking to the complainant and his wife. Thus, the officers were outnumbered. Although no specific threats were made, the complainant felt threatened and nervous that two people had appeared at his residence. Moreover, the officers could have reasonably suspected that defendant had been involved in the previous offense. The complainant indicated he was unsure whether defendant was involved in the break in, but that defendant claimed to be a family member of the person who broke into the car. To control the situation, it was reasonable to put defendant and Green in patrol cars during the investigation. *Marland, supra* at 302-306. Therefore, we reject defendant's contention that he was unlawfully seized.

Defendant next argues that the search of the car violated his Fourth Amendment rights. We disagree.

A defendant may not challenge the propriety of a search and seizure unless the defendant had "an expectation of privacy in the object of the search and seizure" and the expectation is one that society considers reasonable given the totality of the circumstances. *People v Smith*, 420 Mich 1, 28; 360 NW2d 841 (1984). A defendant's subjective expectation of privacy is unreasonable when the object is left in plain view. *People v Custer (On Remand)*, 248 Mich App 552, 561-562; 640 NW2d 576 (2001).

An officer may seize without a warrant an item that is in plain view if the officer is lawfully in the position from which the item can be seen and the incriminating character of the item is immediately apparent. *People v Champion*, 452 Mich 92, 101; 549 NW2d 849 (1996), citing *Horton v California*, 496 US 128; 110 S Ct 2301; 110 L Ed 2d 112 (1990). Officer Newcomb testified that he looked through the passenger side of the windshield and noticed the handle of a gun protruding approximately one-half inch from underneath the passenger seat in

[1] Unless there is a compelling reason, Const 1963, art 1 § 11 should be treated the same as the Fourth Amendment of the United States Constitution. *People v Levine*, 461 Mich 172, 178; 600 NW2d 622 (1999).

plain view. This Court has found that an officer may lawfully enter a private driveway unless forbidden to do so by the owner. *Shankle, supra* at 693-694. Officer Newcomb testified that the car was located in the apartment complex parking lot, which was open to the general public. There was no indication that the owner of the apartment complex had forbidden police to enter the lot; thus, the officer could lawfully enter the parking lot. *Id.*[2] According to Newcomb, he knew from experience what the bottom of that type of gun looked like because he used to carry a similar gun. Thus, the incriminating character of the gun was immediately apparent. *Id.*[3]

Defendant next argues that his subsequent statements to police, made after *Miranda* warnings were given, should have been suppressed because the subsequent statements were the fruit of the illegally obtained statement,[4] the subsequent statements were more detailed renditions of the first statement, and no intervening circumstances purged the taint of the first statement. We disagree.

Whether a person is in custody and entitled to *Miranda* warnings is a mixed question of fact and law subject to de novo review. *People v Coomer,* 245 Mich App 206, 219; 627 NW2d 612 (2001). However, the court's factual findings regarding the circumstances surrounding the making of the statement are reviewed for clear error. *Id. Miranda* warnings must be given when a person is either in custody or is significantly deprived of freedom of action. *People v Roark,* 214 Mich App 421, 423; 543 NW2d 23 (1995). Whether a defendant was in custody depends on whether he reasonably believed he was not free to leave under the totality of the circumstances. *Id.* As previously indicated, it was reasonable for defendant to conclude he was not free to leave when he was locked in the back of a police car.

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[2] Citing *Coolidge v New Hampshire,* 403 US 443, 464-473; 91 S Ct 2022; 29 L Ed 2d 564 (1971), defendant argues that discovery of the gun had to be inadvertent before it fell within the plain view exception. More recent precedent has rejected the inadvertence requirement in *Coolidge*. *Horton, supra* at 141-142; *Champion, supra* at 101 n 6.

[3] Defendant appears to argue that the officer had no legal right to be near the car because defendant was nowhere near the car and nobody else was in the car. In making this argument, defendant relies on cases involving the automobile or search incident to arrest exception, *United States v Fafowora,* 865 F2d 360 (1989); *Chimel v California,* 395 US 752; 89 S Ct 2034; 23 L Ed 2d 685 (1969); *People v Fernengel,* 216 Mich App 420; 549 NW2d 361 (1996); *United States v Strahan,* 984 F2d 155 (1993); *Arizona v Dean,* 76 P3d 429 (2003), and the inventory exception *People v Seigel* 95 Mich App 594; 291 NW2d 134 (1980); *Commonwealth v Brinson,* 800 NE2d 1032 (2003), to the search warrant requirement rather than the plain view exception. The search incident to arrest exception only permits a search of the area in the defendant's immediate control, *Fernengel, supra* at 424, citing *Chimel, supra,* while an inventory search requires a valid arrest, *People v Houstina,* 216 Mich App 70, 77; 549 NW2d 11 (1996). Neither of these requirements are necessary for the plain view exception. See *Champion, supra* at 101-102. Therefore, the cases cited by defendant are inapposite.

[4] The United States Supreme Court found that the fruit of the poisonous tree analysis applicable to Fourth Amendment violations does not apply to evidence – including confessions after *Miranda* warnings were given – obtained as a result of *Miranda* violations. *Oregon v Elstad,* 470 US 298, 306-308; 105 S Ct 1285; 84 L Ed 2d 222 (1985). See also *United States v Patane,* ___ US ___; 124 S Ct 2620, 2624, 2630-2631; 159 L Ed 2d 667 (2004).

When a person is placed in the back of a police car, the fact that the person is told he will be released at some point in the future does not change the fact that the person is in custody until the release occurs. See *Roark, supra* at 424. Contrast *People v Burton*, 252 Mich App 130, 139-140; 651 NW2d 143 (2002) (defendant detained for a field sobriety test was not handcuffed or confined to police car while being questioned). Therefore, defendant should have been given *Miranda* warnings before being questioned at the scene. Failure to give *Miranda* warnings requires suppression of the statement from the prosecutor's case in chief. *People v Anderson*, 209 Mich App 527, 531; 531 NW2d 780 (1995). Therefore, defendant's statement at the scene was properly suppressed.

Nevertheless, relying on *Oregon v Elstad*, 470 US 298, 310; 105 S Ct 1285; 84 L Ed 2d 222 (1985), plaintiff argues that "the failure of law enforcement to administer warnings required by *Miranda* without more does not taint the subsequent confession of a defendant made after he had been fully advised of and waived his *Miranda* rights." The trial court found that a subsequent statement obtained after a *Miranda* violation was not automatically excluded pursuant to *Elstad*. In *Elstad, supra* at 300, police arrived at the defendant's house with a warrant for his arrest. While one officer took the defendant's mother to the kitchen to explain what was happening, the officer who stayed with defendant asked defendant if he knew why the police came to talk with him, asked defendant if he knew the robbery victims, and stated that the officer felt the defendant was involved in the robbery. *Id.* at 301. The defendant responded that he was there. *Id.* The defendant was taken to the Sheriff's office and after about an hour was given *Miranda* warnings by the two officers. *Id.* The defendant then gave a full confession. *Id.* at 301-302.

The United States Supreme Court found admissible the confession the defendant gave after *Miranda* warnings. *Elstad, supra,* 470 US at 314. In so doing, the Court noted:

> It is an unwarranted extension of *Miranda* to hold that a simple failure to administer the warnings, unaccompanied by any actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will, so taints the investigatory process that a subsequent voluntary and informed waiver is ineffective for some indeterminate period. Though *Miranda* requires that the unwarned admission must be suppressed, the admissibility of any subsequent statement should turn in these circumstances solely on whether it is knowingly and voluntarily made. [*Id.* at 309.]

*Elstad* directs courts to conduct a traditional analysis whether the subsequent statement was knowing and voluntary.[5] Whether a statement is voluntary is determined by considering the following nonexhastive list of factors:

[5] Whether a defendant's waiver was knowing and intelligent requires an evaluation of his "'age, experience, education, background, and intelligence,'" and capacity to understand the warnings. *People v Daoud*, 462 Mich 621, 634; 614 NW2d 152 (2000). Defendant did not argue at trial and does not argue on appeal that any of these factors affected his ability to knowingly and intelligently waive his rights. Moreover, because many of these factors are included in the (continued…)

> "[T]he age of the accused; his lack of education or his intelligence level; the extent of his previous experience with the police; the repeated and prolonged nature of the questioning' the length of the detention of the accused before he gave the statement in question; the lack of any advice to the accused of his constitutional rights; whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession; whether the accused was injured, intoxicated or drugged; or in ill health when he gave the statement; whether the accused was deprived of food, sleep, or medical attention; whether the accused was physically abused; and whether the suspect was threatened with abuse." [*People v Akins*, 259 Mich App 545, 564; 675 NW2d 863 (2003), quoting *People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988).]

A review of the evidence presented by the prosecutor indicates that defendant's subsequent statements, made after *Miranda* warnings were given, were voluntary. Moreover, we do not find that *Missouri v Seibert*, ___ US ___; 124 S Ct 2601; 159 L Ed 2d 643 (2004) affects the admissibility of defendant's subsequent statements. In *Seibert*, a plurality found coercive the interrogation practice of questioning a suspect until a confession is obtained then giving *Miranda* warnings and asking the same questions again. *Id.* at 2610-2611. The Court distinguished its decision from the one in *Elstad*, stating:

> The contrast between *Elstad* and this case reveals a series of relevant facts that bear on whether *Miranda* warnings delivered midstream could be effective enough to accomplish their object: the completeness and detail of the questions and answers in the first round of interrogation, the overlapping content of the two statements, the timing and setting of the first and the second, the continuity of police personnel, and the degree to which the interrogator's questions treated the second round as continuous with the first. In *Elstad*, it was not unreasonable to see the occasion for questioning at the station house as presenting a markedly different experience from the short conversation at home; since a reasonable person in the suspect's shoes could have seen the station house questioning as a new and distinct experience, the *Miranda* warnings could have made sense as presenting a genuine choice whether to follow up on the earlier admission.
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> At the opposite extreme are the facts here, which by any objective measure reveal a police strategy adapted to undermine the *Miranda* warnings. The unwarned interrogation was conducted in the station house, and the questioning was systematic, exhaustive, and managed with psychological skill. When the police were finished there was little, if anything, of incriminating potential left unsaid. The warned phase of questioning proceeded after a pause of only 15 to 20 minutes, in the same place as the unwarned segment. When the same officer who had conducted the first phase recited the *Miranda* warnings, he said nothing to counter the probable misimpression that the advice that anything

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(…continued)

voluntariness analysis, a separate "knowing and intelligent" analysis has not been performed.

> Seibert said could be used against her also applied to the details of the inculpatory statement previously elicited.
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> The impression that the further questioning was a mere continuation of the earlier questions and responses was fostered by references back to the confession already given. It would have been reasonable to regard the two sessions as parts of a continuum, in which it would have been unnatural to refuse to repeat at the second stage what had been said before. [*Id.* at 2612-2613.]

The facts of the instant case are more like those of *Elstad* than those of *Seibert.* In the instant case, officer Buckberry merely asked defendant at the scene whether it was his gun. This did not entail a completeness and detail of questions and answers. Although the question was asked again after *Miranda* warnings were given, the circumstances surrounding defendant's purchase and transport of the gun and his arrival at the complainant's door were not elicited at the scene. The two interrogations took place at different locations approximately one hour apart and were conducted by two different officers. Moreover, Officer Knittell testified that he did not believe he referred to the first statement when he conducted the second interview. Therefore, *Seibert* does not bar the admission of defendant's subsequent confessions.

Defendant argues that his convictions of both felony firearm and felon in possession violated his right to be free from double jeopardy. Defendant claims that the Legislature could not have intended to impose multiple punishments when the felon in possession statute was enacted after the felony firearm statute. However, this Court is bound by decisions of the Michigan Supreme Court. *O'Dess v Grand Trunk W R Co*, 218 Mich App 694, 700; 555 NW2d 261 (1996). Our Supreme Court in *People v Calloway*, 469 Mich 448, 452; 671 NW2d 733 (2003), held that no double jeopardy violation occurred when a defendant was convicted of both felony firearm and felon in possession. Therefore, we reject defendant's argument.

Affirmed.

/s/ William C. Whitbeck
/s/ Brian K. Zahra
/s/ Donald S. Owens